(3)

Supreme Court, U.S.
FILED
FEB 13 1996
CLERK

No. 95-1054

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

K.W. THOMPSON TOOL COMPANY, INC.,
Petitioner,

v.

SUSAN R. PUMPHREY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM

Of Counsel:

WARREN E. JONES
NEIL D. MCFEELEY
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
300 North Sixth Street
Boise, Idaho 83701
(208) 344-8535

DANIEL W. NELSON
GIBSON, DUNN & CRUTCHER

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY MEMORANDUM 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:	Page(s)
American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co., 62 F.3d 574 (3d Cir. 1995)	6
Burns v. United States, 501 U.S. 129 (1991)	7
Chambers Dev. Co. v. Passaic Counties Util. Auth., 62 F.3d 582 (3d Cir. 1995)	5
Citizens Bank v. Stumpf, 116 S. Ct. 287 (1995).	2
Demarest v. Manspeaker, 498 U.S. 184 (1990)	2
Jardines Bacata, Ltd. v. Diaz-Marquez, 878 F.2d 1555 (1st Cir. 1989)	4
Jones v. Automobile Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990)	7
Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990)	2
Moody v. Town of Weymouth, 805 F.2d 30 (1st Cir. 1986)	6
United States v. Grayson, 879 F.2d 620 (9th Cir. 1989)	1,2,6
United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989)	5
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	2
Statutes and Rules:	
Fed. R. Civ. P. 56	*passim*

REPLY MEMORANDUM

Petitioner K.W. Thompson Tool Company, Inc. ("Thompson") respectfully files this reply to respondent's brief in opposition to Thompson's petition for a writ of certiorari.

1. Respondent's main argument in opposition to certiorari is that the district court did not "really" enter summary judgment *sua sponte* with respect to the fraud upon the court issue in this case. *See* Opp. at 1, 5. Respondent, however, all but admits that she has waived this argument, which, in any event, is flatly contradicted by the record below.

a. As respondent candidly concedes, she was fully "content" to accept Thompson's characterization of the district court's summary judgment ruling on the fraud upon the court issue as "*sua sponte*" in both the district court and the Ninth Circuit. Opp. at 5. In her brief in opposition to Thompson's Motion to Alter or Amend the Judgment, for example, respondent contended that the district court "had authority to enter summary judgment *sua sponte* on the grounds that fraud was perpetrated on the Court," and devoted the first section of her brief to discussing the Ninth Circuit's exception to Fed. R. Civ. P. 56(c)'s notice and hearing requirements for *sua sponte* summary judgment as articulated in *United States v. Grayson*, 879 F.2d 620 (9th Cir. 1989). *See* Plaintiffs' Objection To Defendant's Motion To Alter Or Amend The Judgment Or, In The Alternative, To Amend Findings at 2-4. Likewise, the first section of respondent's Ninth Circuit brief was entitled "The District Court Did Not Err In Granting Summary Judgment On A Theory Not Advanced By [Plaintiff]," and again relied exclusively upon the Ninth Circuit's *Grayson* decision.

Appellee's Brief (9th Cir.) at 6-8. The Ninth Circuit agreed, applying *Grayson* to affirm the district court's judgment that Thompson committed a fraud upon the court, even though respondent "did not specifically move for summary judgment on this ground." Pet. App. at 5a n.1.

Respondent nonetheless now declares that "she is no longer willing to assume" that the district court entered summary judgment *sua sponte*. Opp. at 5. But having failed to raise the issue -- and, in fact, having successfully asserted the opposite position -- in the courts below, respondent has waived the issue. She cannot raise it in this Court for the first time. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 (1990) (stating that a respondent may "'defend . . . [the] judgment on any ground *properly raised below*,'" and finding that respondent had waived argument by failing to present it below) (emphasis added) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)); *accord Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1990); *Citizens Bank v. Stumpf*, 116 S. Ct. 286, 291 n.** (1995).

b. Irrespective of her waiver problem, respondent simply cannot overcome the unambiguous record below, which reveals that the district court did, in fact, grant summary judgment *sua sponte* against Thompson on the fundamental issue in this case -- fraud upon the court -- without providing Thompson notice or an opportunity to be heard. Respondent cannot point to any place in the record where the district court provided any notice of its intent to enter summary judgment on the fraud upon court issue because the district court never did so. Moreover, respondent concedes that she did not move for summary judgment on the fraud upon the court issue. *E.g.*, Opp. at 2. Indeed, respondent vigorously opposed Thompson's motion for summary judgment on that issue. She therefore has no choice but to "accept" (*id.* at 1)

Thompson's statement that respondent "disputed a host of material issues of fact relating to her fraud upon the court allegations." Petition at 5.

As respondent also recognizes, her summary judgment motion, on its face, emphatically disclaimed any intention to litigate the fraud upon the court issue at the summary judgment stage. Instead, her motion was based "upon the argument that she was entitled to relief on the grounds of unconscionability 'irrespective of whether Thompson's conduct was technically fraud on the Court'." Opp. at 2 (quoting respondent's Memorandum Supporting Motion for Summary Judgment at 2).

Although respondent in this Court for the first time advances the highly peculiar argument that Thompson's opposition to her summary judgment motion somehow "changed the terms of [respondent's] arguments to the trial court from 'unconscionability' to 'fraud,'" Opp. at 5, the record below shows the opposite. Thompson's opposition to summary judgment explicitly made clear its understanding that respondent intentionally was *not* seeking summary judgment on the fraud issue, declaring:

> The thrust of plaintiff's legal argument appears to be that the original judgment in this case should be set aside if the result is "unconscionable" *even if there were no fraud.* The plaintiffs, *apparently recognizing that they are unable to make out a case that fraud occurred in the original trial,* are asking the Court to conclude that "unconscionable conduct is *by itself* a reason for setting aside the original judgment *regardless of whether that conduct technically amounts to a fraud on the court.*"

Thompson's Memorandum in Response to Plaintiff's Motion for Summary Judgment at 11 (emphasis added).

Respondent's reply brief did not in any way suggest that the terms of her motion had been "changed" by Thompson's opposition. Rather, she forcefully reiterated that her motion "assum[ed] that Thompson's conduct was *not* fraudulent." Plaintiff's Reply Memorandum Supporting Motion for Summary Judgment at 15 (emphasis added).

In short, respondent did not seek summary judgment on the issue of fraud upon the court and, therefore, neither party had any inkling that the district court might grant summary judgment against Thompson on that basis.[1] The question whether Rule 56 permits entry of summary judgment against a party *sua sponte* without providing notice and an opportunity to oppose summary judgment is thus squarely presented by this case and should be resolved by the Court.

2. Respondent contends that the conflict among the circuits on the question presented is "more apparent than

---

[1] Respondent's suggestion that Thompson's own motion for summary judgment put it on notice that summary judgment could be entered against it is baseless. *See* Petition at 4-5, 18 n. 9; *see, e.g., Jardines Bacata, Ltd.* v. *Diaz-Marquez*, 878 F.2d 1555, 1561 & n.7 (1st Cir. 1989) (holding that district court's failure to provide notice was improper where plaintiff had moved for summary judgment yet district court *sua sponte* entered summary judgment in favor of defendant). Thompson had no motive or opportunity to oppose summary judgment on the fraud upon the court issue, a process that would have involved submission of a statement of material disputed facts and opposing affidavits from its witnesses, who were deposed by respondent but not by Thompson, and who never had a chance to explain their side of the story to the district judge. Opposing summary judgment obviously also would have involved a whole different set of legal arguments, including the argument that where, as here, intent is a crucial issue in the case, summary judgment is not appropriate. *See* Petition at 16 n.6.

real." Opp. at 7. If anything, however, respondent's discussion of the conflict actually shows that the division and confusion in the circuits are even worse than Thompson has described. *See* Petition at 6-13.

Respondent inexplicably argues that the Fourth Circuit in *United States Dev. Corp.* v. *Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731 (4th Cir. 1989), "implicit[ly]" endorsed the Ninth Circuit's rule that district courts need not provide advance notice before entering summary judgment *sua sponte* against a party. Opp. at 8. But no fair reading of that decision could possibly yield such an interpretation. The Fourth Circuit squarely held that the power to grant summary judgment *sua sponte* "is contingent on giving the losing party notice. . . . [T]his notice . . . should provide the full ten days called for by Fed. R. Civ. P. 56(c)." *Id.* at 735 (citations and footnotes omitted).[2] Thus, the Fourth Circuit's rule strictly requiring notice before *sua sponte* grants of summary judgment directly conflicts with the Ninth Circuit rule that such notice is not required.

Respondent's characterization of the Third Circuit's bright-line rule, which likewise conflicts with the Ninth Circuit's position, is equally erroneous. The Third Circuit has repeatedly and clearly mandated that "a judgment cannot be entered without first placing the adversarial party on notice that the court is considering a *sua sponte* summary judgment motion." *Chambers Dev. Co.* v. *Passaic Util. Auth.*, 62 F.3d 582, 584 n.5 (3d Cir. 1995).

---

[2] The Fourth Circuit did cite a Ninth Circuit case in a footnote, but merely for the proposition that "in extraordinary circumstances" a court may give less than ten days notice of its intent to enter summary judgment *sua sponte*. 873 F.2d at 735 n.3.

As respondent points out, Opp. at 7-8, the Third Circuit has held that the right to notice under Rule 56(c), like other rights, can be waived by a litigant's failure to raise the issue. That unremarkable holding, however, is not at all "contrary to that of a bright-line approach." Opp. at 8. The Third Circuit has established a hard and fast rule that notice is required because "orders granting summary judgment *sua sponte* endanger important rights and, unless waived . . . are likely to result in judicial inefficiency and deprivation to the rights of one of the parties." *American Flint Glass Workers Union, AFL-CIO* v. *Beaumont Glass Co.*, 62 F.3d 574, 578 n. 5 (3d Cir. 1995).

Respondent does not dispute that the most recent decisions of the First, Seventh and D.C. Circuits also have announced a bright-line rule requiring that notice must always be provided under Rule 56 before a *sua sponte* entry of summary judgment. *See* Petition at 8-9. While respondent cites a 1981 decision from the Seventh Circuit and a 1986 First Circuit decision that applied rules more closely resembling the Ninth Circuit's position, Opp. at 7-8, she says nothing about the subsequent decisions cited by Thompson, which announce the strict notice requirement and thus conflict with the Ninth Circuit's *Grayson* rule. To the extent that the older decisions relied upon by respondent are still good law -- at best, a doubtful proposition -- they are only relevant insofar as they further demonstrate the state of disarray that pervades the circuits on the question presented by this case.[3]

---

[3] One of the cases cited by respondent, *Moody* v. *Town of Weymouth*, 805 F.2d 30 (1st Cir. 1986), involved the slightly different question whether notice is required before a district court converts a motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 12(b)(6), which, unlike Rule 56(c), does not include an express notice requirement. But even

Perhaps because there is nothing she can say to reconcile them, respondent does not even attempt to address the decisions of the Second, Fifth, Sixth, Eighth and Eleventh Circuits cited by Thompson. Between them, these five circuits have, in the last six years, applied at least six different rules concerning the question whether Rule 56(c) requires that notice be provided before *sua sponte* entry of summary judgment. *See* Petition at 10-13. The conflict is longstanding and has been getting worse with the passage of time. This Court's intervention is manifestly warranted.

3. Finally, respondent contends that this case presents the Court with a fact-bound question that is not important. Opp. at 9-11. But that is flatly incorrect. The question presented is clearly important. *See* Petition at 14-21; *cf. Burns v. United States*, 501 U.S. 129, 138 (1991) (holding district court's *sua sponte* departure from sentencing guidelines improper without first providing notice and noting that dispensing with notice would have required the Court to confront "the serious question whether notice . . . is mandated by the Due Process Clause."). The question also is a purely legal one: whether the plain language of Rule 56, which requires 10-days notice of a motion for summary judgment, requires notice before a court enters summary judgment *sua sponte*. The Court need not consider any facts to decide this question, which is vital to

---

with respect to that specific issue, the circuits are divided. *See, e.g., Jones* v. *Automobile Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1533 (11th Cir. 1990) (canvassing conflicting decisions, concluding that notice is "of the utmost importance" and "a valuable procedural safeguard" and holding that district courts must provide 10-days notice of intent to convert a Rule 12(b)(6) motion to dismiss into a motion for summary judgment).

the fair and efficient administration of federal civil justice, and recurs constantly, as demonstrated by the many conflicting decisions cited by both Thompson and respondent.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant certiorari and set this case for plenary consideration.

February 13, 1996

Respectfully submitted,

*Theodore B. Olson
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

*Counsel of Record

Of Counsel:

Warren E. Jones
Neil D. McFeeley
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
300 North Sixth Street
Boise, Idaho 83701
(208) 344-8535

Daniel W. Nelson
GIBSON, DUNN & CRUTCHER